Filed 12/15/16 P. v. Castillo CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS CASTILLO,

Defendant and Appellant.

F069262

(Tulare Super. Ct. No. VCF255016A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant and a fellow gang member robbed a man at an ATM. During the confrontation, defendant shot the victim, took his money and left in his car. He now raises several challenges to the ensuing convictions and sentence. We reject the bulk of those claims, but do reverse the finding that defendant's attempted murder of the victim

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was premeditated. Additionally, we determine that the sentence on his robbery conviction must be stayed under Penal Code section 654.[1] We otherwise affirm the judgment.

BACKGROUND

Charges

In an information filed in December 2011, defendants Jesus Castillo (Castillo), Roberto Estrada, Jr. (Estrada), and Miguel Quintero (Quintero) were charged with several crimes: attempted murder (count 1, §§ 664/187, subd. (a)); carjacking (count 2, § 215, subd. (a)); first degree automatic teller machine robbery (count 3, § 211[2]); assault with a firearm (count 4, § 245, subd. (a)(2)); assault with a deadly weapon (i.e., knife) (count 5, § 245, subd. (a)(1)).[3] The information also contained several special allegations as to Castillo: that counts 1 through 4 were violent felonies subject to the gang enhancement found in section 186.22, subdivision (b)(1)(C); that count 2 is subject to section 186.22, subdivision (b)(4); that count 5 was subject to the gang enhancement found in section 186.22, subdivision (b)(1)(A); that Castillo personally caused great bodily injury with respect to all five counts (§ 12022.7, subd. (a)); that Castillo personally used a firearm in the commission of each of the five counts (§ 12022.5, subd. (a)); that Castillo's firearm use caused great bodily injury as to counts 1 through 3 (§ 12022.53, subd. (d)); and that a principal personally and intentionally discharged a firearm causing great bodily injury as to counts 1 through 3 (§ 12022.53, subds. (d) & (e)(1).)

Jury Verdicts

On December 18, 2013, the jury convicted Castillo on all five counts. The jury found defendant committed count 1 (attempted murder) willfully, deliberately and with

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] See also section 212.5, subd. (b).

[3] Estrada was also charged with evading an officer with willful disregard (count 6, § 2800.2, subd. (a).)

premeditation (§ 664, subd. (a)); for the benefit of, at the direction of or in association with a criminal street gang (§ 186.22, subd. (b)); during which he personally and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)) proximately causing great bodily injury to a non-accomplice (§ 12022.53, subd. (d) & 12022.7, subd. (a)). The jury found that in the commission of count 2 (carjacking), defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (b)–(c)) proximately causing great bodily injury to a nonaccomplice (§§ 12022.53, subd. (d), 12022.7, subd. (a)); and that defendant committed count 2 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b).) The jury found that defendant committed count 3 (robbery) for the benefit of, at the direction of, or in association with a criminal street gang (*ibid.*) while the person robbed was using or had just used an ATM machine and was still near the machine; and that he personally and intentionally discharged a firearm (§ 12022.53, subds. (b)–(c)) proximately causing great bodily injury to a nonaccomplice (§§ 12022.53, subd. (d), 12022.7, subd. (a).) The jury found defendant committed count 4 (assault with a firearm) for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)) and personally used a firearm (§ 12022.53, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a).) Finally, the jury found that defendant committed count 5 (assault with a deadly weapon) for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)) and that in the commission of count 5, defendant personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a).)

Sentence

The court sentenced defendant as follows: an aggravated term of six years on count 3 (robbery), plus a consecutive 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)), plus 25 years to life for the section 12022.53, subdivision (d) enhancement; a consecutive term of life with minimum parole eligibility of 15 years

(§ 186.22, subd. (b)(5)) on count 1 (attempted murder), plus a consecutive 25 years to life for the section 12022.53, subdivision (d) enhancement; a concurrent term of 15 years to life (§ 186.22, subd. (b)(4)) on count 2 (carjacking), plus 25 years to life for the section 12022.53, subdivision (d) enhancement; a term of three years on count 4 (assault with a firearm), plus a consecutive four years for the section 12022.5, subdivision (a) enhancement, plus a consecutive term of three years for the section 12022.7, subdivision (a) enhancement, plus a consecutive 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)) all stayed under section 654; a term of three years on count 5 (assault with a deadly weapon), plus a consecutive four years for the section 12022.5, subdivision (a) enhancement, plus three years for the 12022.7, subdivision (a) enhancement, plus a consecutive three years for the gang enhancement (§ 186.22, subd. (b)(1)(A).) The sentence on count 5 and its enhancements were all stayed under section 654. Defendant was also ordered to pay restitution and fines.

FACTS

At around 5:00 a.m. on July 12, 2011, Jeffrey Gould drove his mother's car to a Bank of Sierra ATM on Visalia Road in Exeter. He parked next to the ATM. While on the phone with his mother, he walked up and withdrew $700. His mother then called again and told him to withdraw another $220. The ATM indicated there were insufficient funds to withdraw the additional $220. When the ATM dispensed his receipt, it fell to the ground. While Gould retrieved the receipt, he noticed an older man behind him. Gould let the man use the ATM and walked back to his car, still talking to his mother. After the man finished using the ATM, Gould again tried to withdraw more money and was again notified he had insufficient funds. The receipt for this transaction also fell to the ground, and Gould picked it up.

That is when defendant and another person "ran up" to him. Other evidence eventually showed that the second person was Roberto Estrada, Jr.

Estrada was holding a knife and told Gould, "Give me your shit, Holmes" Gould responded, "F**k you." Estrada then hit Gould. Estrada and Gould "scuffled around." Defendant then shot Gould and said, " 'Do the f**k I told you, punk.' " Defendant and Estrada picked up Gould's money off the ground and left in his car.

An ATM camera captured much of the incident, and the footage was admitted at trial. Gould testified everything was accurate on the video.

Gould was hospitalized for over two weeks. The bullet broke two of Gould's ribs and "took" a lower piece of his left lung. Gould also had his spleen removed. The bullet began causing an abscess requiring surgery to remove it.

Gould thought the two men were Sureño gang members because one of them was wearing "a blue-white jersey." Additionally, Gould believed the word "Holmes" was "gangster slang."

Raul Pablo's Testimony

Gardener Raul Pablo (Pablo) began working near the Save Mart on Visalia Road in Exeter at around 5:00 a.m. on July 12, 2011. After Pablo began working, a dark-colored Blazer came behind his trailer. Pablo watched the Blazer because he was concerned something would be stolen from him. He saw two young Hispanic men exit the Blazer. Pablo thought the two men were going to get money from the bank nearby. Then Pablo heard a gunshot.

The two men took a white car in the parking lot. The Blazer also left when Pablo heard the gunshot. Pablo approached the ATM and saw a young man who had been shot.

Officer Ashley Salinas's Testimony

Officer[4] Ashley Salinas with the City of Exeter received a call at about 5:15 a.m. that day. Salinas responded to the Bank of Sierra and observed a bloody man sitting on the ground in front of the bank. The victim told Salinas he had been shot. He had difficulty communicating with Salinas, was sweating and appeared to be in shock. He

[4] At the time of trial, Salinas was a detective.

told Salinas the suspects had shot him, robbed him, and had taken his car. Salinas informed dispatch that the victim's vehicle was a white Mazda.

Officer Salinas also examined a nine-millimeter Luger shell casing recovered at the scene.

Officer Stephen Mota's Testimony

Officer Stephen Mota was dispatched a couple blocks north of Bank of Sierra pursuant to a report that the victim's vehicle had been found there. When Mota arrived, he observed that the vehicle was still running.

Officer Daniel Green's Testimony

Officer Daniel Green, then a detective, was the primary investigator of the July 12, 2011, shooting. He was called out to the scene around 5:45 a.m. on July 12, where he reviewed surveillance footage from the ATM.

Later that afternoon, Detective Green "went by" a home on West Willow in Exeter and observed a black Chevy Trailblazer in the driveway. The next day, Green executed a search warrant at the residence. In one of the rooms, Green found a handgun with its slide open. He also found a loaded magazine, a nine-millimeter Luger bullet outside the magazine, and a cleaning agent. A jersey with blue writing and a baseball cap were also found in the home.

Farmersville Police Department Detective Tony Mosqueda conducted surveillance on the West Willow home on the night of July 13, 2011. At about 10:00 or 10:30 p.m., Mosqueda observed a gold Plymouth van and a red Chevy Silverado truck leave the residence. Mosqueda requested that another officer conduct a traffic stop of the vehicles. The other officer activated his overhead emergency lights. The red truck then passed the van and "sped off." Defendant later admitted to running from the police in the truck.

Defendant's Interrogation

Hours later, Detective Mosqueda interrogated defendant and took photographs of his tattoos. Defendant had the letters "H" and "G" tattooed on his abdomen.

Defendant's interrogation was played for the jury.[5] Defendant admitted he had been in the Silverado and ran from police. Defendant said he ran because of "what I'm on" – meaning methamphetamine. He had used methamphetamine a couple hours before the interrogation.

Defendant had been staying with his cousin in the house on Willow for the past two weeks. Before that, defendant had been in Hawaiian Gardens.
When asked if he belongs to a gang, defendant responded, "Well I hang around with them…." Detective Green followed up, asking directly, "Are you part of a gang?" Defendant replied, "Skip that [question]."

After defendant was told that police had video of the incident, defendant admitted he had "something to do with it." Defendant had been with his cousin Miguel, Miguel's "girl" Liz, and Robert (aka "Fool"). Defendant and Estrada were sitting in the back seat of the Trailblazer[6] when defendant saw a "twenty-something male" using an ATM machine. Defendant and his "buddy" hopped out of the car and saw "the cash." Defendant told the man, "Shoot me the money." The man threw the cash at defendant and Estrada.

Defendant admitted he had a gun, but initially said he did not know who shot the victim. Later, defendant said he shot the victim because "I thought if, you know, he was coming towards me I was the one who was going to end up being shot…. He's way bigger than me, man." Defendant thought the gun he had was a nine-millimeter. After the incident, he gave the gun to his cousin Miguel.

After grabbing the money, defendant and Estrada "jumped in" a car near the victim. Defendant drove the car away. Defendant and Estrada got out of the car by a

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[5] An audio recording of the interrogation was admitted into evidence and played for the jury. A transcript, not admitted into evidence, was provided to the jury. The parties stipulated at trial that the court reporter need not transcribe the audio. On appeal, defendant cites the transcript for the interrogation.

[6] Other testimony at trial showed Miguel Quintero was driving the Trailblazer.

stop sign. The vehicle they had arrived at the ATM in "was parked right there like waiting to see if … something were [*sic*] wrong…." Defendant and Estrada ran to the vehicle, got in, and went home.

Lizette Diaz's Trial Testimony

Lizette Diaz (Diaz) did not want to testify. She is the mother of Miguel Quintero's child. Diaz knew defendant as Miguel Quintero's cousin. When asked if she had heard of someone named "Bones." Diaz testified she had seen Bones once. Other evidence indicates that "Bones" was in fact Roberto Estrada, Jr.

One time, Quintero drove Diaz, defendant, and Bones to a fast food restaurant in Visalia.[7] The four then went to Diaz's house. After about an hour, they left, intending to go to Quintero's house. Quintero pulled into a shopping center between a pizza place and a bank. Defendant and Bones[8] got out of the vehicle. Quintero and Diaz drove away. Quintero decided to pull over near a stop sign. Quintero and Diaz sat and talked about defendant. Quintero again began driving away when they saw defendant and Bones. Both men got in the car, and Diaz did not remember whether they said anything as they entered.

Lizette Diaz's Pretrial Interview

Detective Green interviewed Diaz in September 2011. Green had tried to interview her earlier, but she would not return his phone calls.

Detective Green began by telling Diaz that she was not under arrest and was free to go at any time. Diaz told Green that she, Miguel Quintero, defendant, and Bones went to a fast food restaurant, then to her house. Diaz told Green that defendant or Bones told them to pull over into a parking lot. Bones and defendant got out of the vehicle, and Quintero and Diaz left. Quintero then stopped on the side of a road. After they had been

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[7] Diaz initially said only she and Quintero were in the vehicle. She later said defendant and Bones were also in the vehicle.

[8] Diaz referred to Bones as "the other guy."

stopped "for some time," a white vehicle pulled up in front of them. Defendant was driving and Bones was with him. Defendant and Bones then got into the vehicle Quintero was driving.

Gang Testimony

Kasey Woodruff

Kasey Woodruff from the Los Angeles County Sheriff's Department testified that she interviewed defendant in July 2011 for this case. Defendant told her that he had recently been "jumped in" as a member of the Varrio Hawaiian Garden. Defendant told her he goes by the moniker of "Chewy." He also showed her a Hawaiian Gardens tattoo on his chest and an "H" and a "G" on his face.

Esteban Soliz

Detective Esteban Soliz is a member of the Los Angeles County Sheriff's Department gang unit. Soliz testified that "Hawaiian Garden" or "Varrio Hawaiian Garden" is an "Hispanic gang," which controls the city of Hawaiian Garden in southeast Los Angeles county.

Detective Soliz has investigated 200 to 300 cases in which Varrio Hawaiian Garden gang members were suspects. Hawaiian Garden is the only Hispanic gang in the city, but they also commit crimes outside the city. The Hawaiian Garden gang claims the number 13 and the "G" from the Green Bay Packers insignia.

Previous Hawaiian Garden Offenses

In June 2005, Deputy Jerry Ortiz was killed by a Hawaiian Garden gang member.

A detective from Exeter contacted Detective Soliz regarding gang tagging that occurred in June 2011. Soliz opined that the graffiti was tagged by a gang member who claims or associates with Hawaiian Garden. Based on what Soliz read, three Hispanic males were tagging graffiti in an alleyway when they were confronted by a witness. The taggers "pulled" handguns and "a shooting occurred."

Detective Soliz testified that on December 17, 2009, three Hawaiian Garden gang members approached a female, pulled out a knife, and told the victim to give them all her money and her phone. The victim decided to surrender the items. The three perpetrators ran from the scene and yelled, "Varrio Hawaiian Garden." All three perpetrators were convicted.

Detective Soliz was asked to identify the primary activities of the Hawaiian Garden gang. Soliz responded, "The crime of activity [*sic*] ranges anything from minor assault with their hands and feet, they can go all the way up to assaults with weapons, whether it be bats, pipes, guns, knives, which would escalate to attempt[ed] murder. [¶] They are good for being convicted of murders, extortions, witness intimidations, vehicle thefts, robberies, burglaries, attempt[ed] robberies, attempt[ed] burglaries. Anything you can think of that's felonious or vicious."

Gang Testimony Concerning Defendant

Detective Soliz researched Estrada's and defendant's gang background. Soliz has spoken to other officers about them, and read police reports and field identification cards concerning them. Soliz has personally spoken with defendant, but not with Estrada.

Detective Soliz described defendant's tattoos depicted in several photographic exhibits. Exhibits 19, 20 and 21 show tattoos on defendant's face depicting an "H" and a "G" for Hawaiian Garden. Exhibits 22 and 23 show tattoos which, together, depict the number 13 which represents a Hispanic gang in the southeast area. A tattoo of three dots was also depicted. Soliz seemed to indicate that while such a tattoo could be a gang-related reference to "my crazy life," such a tattoo alone does not conclusively indicate gang membership. Exhibit 23 also showed tattoos across defendant's left four fingers reading "BHGR" which stands for Barrio Hawaiian Garden Rifa, which represents his gang. Exhibit 24 depicts an "HG" tattoo across defendant's abdomen, which represented Hawaiian Garden. Exhibit 26 depicts a tattoo showing defendant is representing a criminal street gang from the southeast Los Angeles area.

Exhibit 27 depicts defendant's belt buckle which says "LA." Detective Soliz explained that "they" – presumably gang members – "use a lot of sports memorabilia." Soliz said that Los Angeles Dodgers clothing is popular with Sureño gangs. Soliz opined that based on the totality of the circumstances – including defendant's gang tattoos – the blue "LA" belt buckle was gang-related clothing.

Detective Soliz opined that defendant is a gang member. He meets several criteria for gang membership: gang tattoos, self-admission of gang membership and being arrested with another gang member.

Gang Testimony Concerning Estrada

Detective Soliz also testified concerning exhibits depicting Estrada's tattoos. Estrada has a tattoo of red lips on the left side of his neck. Soliz explained that a talented tattoo artist can make a tattoo of lips that, when viewed a certain way, depict the number 13. This way, gang members can hide the fact that they are representing south side gangs. Estrada also has an "HG" tattoo on his abdomen, representing Hawaiian Garden. On his upper back, Estrada has a tattoo reading "SELA" which stands for southeast Los Angeles, representing Hispanic gang membership. Across his back, Estrada has a tattoo reading "Hawaiian Garden" demonstrating he is proud of his gang. Underneath that tattoo, Estrada has a tattoo of "the Hawaiian Garden punch character." The character is wearing a crown with the Green Bay Packers' insignia, representing "the Gardens."

Detective Soliz opined that Estrada is a gang member. Estrada has gang tattoos, has admitted gang membership, and has gang clothing.

Gang Testimony Concerning Present Offenses

The prosecutor presented Detective Soliz a hypothetical based on the facts of this case. Soliz testified such a crime would promote and benefit the Varrio Hawaiian Garden gang. The fact that two gang members committed the crime displays that the gang is more of a threat to the area than if just one gang member had committed the crime. Additionally, Exeter is controlled by north side gangs, yet the perpetrators were south

side gang members. By committing the crime in a rival gang's area, the south side gang members are showing they are not afraid of their rivals.

The perpetrators did not need to wear Hawaiian Garden clothing to enhance the gang because "word of mouth will get down to their … neighborhood." Others will hear that these gang members committed a robbery in rival gang territory, which will enhance the perpetrators' status within the gang.

Detective Soliz testified that gang tagging or graffiti shows control; it shows that the gang is in the area. If the tagging is done in a rival gang's area, it shows that they do not fear the rival gang.

Defense Gang Expert's Testimony

Martin Sanchez-Jankowski (Sanchez-Jankowski) testified as the defense's gang expert. Sanchez-Jankowski is a professor of sociology for the University of California. He had an opportunity to read through reports, look at "a video,"[9] and become familiar with the circumstances of the case.

Sanchez-Jankowski said that in order to determine whether a crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, he considers several facts. First, he looks to whether the central leadership of a gang had decided on a particular operation, had designated particular agents of the gang to execute it, and how the operation sustained or inhibited the gang. He would also consider whether the crime was committed spontaneously, and how the crime functionally benefitted the gang.

Sanchez-Jankowski testified that gang-directed crimes are usually committed in the early evening or early morning. Crimes committed in the morning hours between 5:00 and 8:00 are "usually … individual level crime[s] rather than … organizational crime[s]."

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[9] Presumably a reference to the ATM surveillance video.

Sanchez-Jankowski was presented with a hypothetical tracking the facts of the present case and asked whether he would consider such a crime to have been committed at the direction of, for the benefit of, or in association with a criminal street gang. He opined that, in his judgment, such a crime would not have been committed at the direction of, for the benefit of, or in association with a criminal street gang. Sanchez-Jankowski said that if it were an "organizational crime," the knife and gun would have been used quickly after they were brandished.

Sanchez-Jankowski further testified that when gang members are executing directives of the gang, "the idea is that you don't take drugs because that inhibits your ability to think clearly and to act as necessary…." Drug usage increases the chance something will go wrong, which causes the entire gang to suffer to some degree.

Sanchez-Jankowski also testified that it is unusual for gang members to take a car during an organizational crime, because such crimes are "all planned out." He also said it was unusual to bring a female to commit a crime like this.

DISCUSSION

I. Substantial Evidence Challenges

Defendant challenges the sufficiency of the evidence adduced at trial in several respects. He claims there is insufficient evidence to support (1) the force or fear element of carjacking, (2) the jury's finding that he attempted to commit willful, deliberate and premeditated murder, (3) the gang enhancements, and (4) the allegation that Varrio Hawaiian Garden is a criminal street gang.

Substantial Evidence Standard

"Where, as here, a defendant challenges the sufficiency of the evidence on appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] A reviewing court must reverse a

conviction where the record provides no discernible support for the verdict even when viewed in the light most favorable to the judgment below. [Citation.] Nonetheless, it is the jury, not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt. [Citation.] And if the circumstances reasonably justify the trier of fact's findings, the reviewing court's view that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]" (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.)

"A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment, however, risks misleading the court into abdicating its duty to appraise the whole record." (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) We must not "leap[] from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence." (*Ibid*.) Instead, " ' "we must resolve the issue in the light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. [And] we must judge whether the evidence of each of the essential elements … is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' " ' [Citation.]" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153, original italics.)

A. <u>There was Substantial Evidence of Taking by Means of Force or Fear</u>

Carjacking

" 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to

either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

Union of Act and Intent

Section 20 provides, in relevant part, that "[i]n every crime or public offense there must exist a union, or joint operation of act and intent…." (§ 20.) In other words, to be guilty of a crime, the defendant must have the requisite intent *at the time* he or she commits the requisite act. If the requisite intent was formed *after* the criminal act was committed, section 20 would not be satisfied.

Section 20 "is an invariable element of every crime unless excluded expressly or by necessary implication." (*People v. Vogel* (1956) 46 Cal.2d 798, 801, fn. omitted.)

As noted above, carjacking requires an "intent to … deprive" someone of their vehicle, and also requires the actual taking of the vehicle by force or fear. (See § 215, subd. (a).) Defendant essentially argues that there is insufficient evidence defendant or Estrada formed the intent to deprive the victim of the car *before* they applied force to accomplish the taking of the vehicle. We disagree.

There was substantial evidence Diaz and Quintero dropped defendant and Estrada off at the bank where defendant and Estrada intended to rob an ATM user. A reasonable inference from this evidence is that defendant and Estrada knew they would likely need to leave the scene quickly. And, the Attorney General notes that because Diaz and Quintero left the parking lot, defendant and Estrada could not escape by car unless they stole one. Thus, the jury could have reasonably inferred defendant intended to steal a vehicle from the outset.

Defendant disputes this, arguing that the car he and Estrada came in was waiting nearby and could easily be reached by either walking or running.[10] The implication of this argument being that defendant did not plan to steal a vehicle but instead planned to

[10] To the contrary, defendant told police that the car Quintero was driving was "far from us."

leave in the one he came in. But Diaz testified that after she and Quintero left the bank, they stopped by the side of the road, and then left again heading home. Only after they began driving home did they see defendant and Estrada and stop. The jury could have reasonably inferred from Diaz's testimony that she and Quintero were not waiting for defendant and Estrada, and planned to head home without them. If so, defendant and Estrada would not have had a getaway vehicle without stealing one.

Because the jury could have reasonably inferred that defendant and Estrada planned to steal a vehicle from the outset, we reject defendant's substantial evidence challenge.

B. Premeditation

Generally, attempt crimes are punished "by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted." (§ 664, subd. (a).) "However, if the crime attempted, is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." (*Ibid*.)

" ' "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.]' [Citation.]" (*People v. Casares* (2016) 62 Cal.4th 808, 824.) " 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides … which are the result of mere unconsidered or rash impulse hastily executed.' " [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 593.)

"[D]eliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.]" (*People v. Casares*, *supra*, 62 Cal.4th at p. 824.) "[T]he legislative classification of murder into two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than

may be involved in the mere formation of a specific intent to kill ….” (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 100.) “Premeditation and deliberation require ‘substantially more reflection … than the mere amount of thought necessary to form the intention to kill.’ [Citation.]” (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822–823.) Consequently, a “finding of … premeditation and deliberation is proper only when the slayer killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design. [Citation.]” (*People v. Rowland* (1982) 134 Cal.App.3d 1, 7.)

“ ‘Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation] or whether it “leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.” ’ [Citation.]” (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1265, original italics.)

The Attorney General cites facts supporting an inference of intent to kill. We agree there was substantial evidence of intent to kill. However, the Attorney General fails to point to evidence showing “substantially more reflection” than a bare intent to kill.

People v. Anderson Factors

“In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27, [] (*Anderson*), [the Supreme Court] identified ‘three factors commonly present in cases of premeditated murder: “(1) [F]acts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as ‘planning’ activity; (2) facts about the

defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." ' [Citation.] 'As we have cautioned, however, "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way." [Citation.] In other words, the *Anderson* guidelines are descriptive, not normative.' [Citation.]" (*People v. Casares*, *supra*, 62 Cal.4th at p. 824, original italics.)

Planning Activity

The first consideration in *Anderson*'s suggested framework concerns planning activity. Here, there was substantial evidence defendant brought a loaded gun to an ATM with intent to rob one of its patrons. Viewed in the light most favorable to the judgment, this evidence does indicate "planning activity." (See *People v. Lee* (2011) 51 Cal.4th 620, 636.)

However, the Supreme Court sustains findings of premeditation "typically when there is evidence of all three [factors] and otherwise requires at least extremely strong evidence of [planning activity] or evidence of [motive to kill] in conjunction with either

[evidence of planning activity or nature of the killing]." (*Anderson, supra,* 70 Cal.2d at p. 27.)[11] Therefore, we will proceed to consideration of the other two factors.

Defendant's Conduct with Respect to the Victim

The second *Anderson* category concerns "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim …." (*People v. Casares, supra,* 62 Cal.4th at p. 824, internal quotation marks omitted.) "The second *Anderson* factor refers not merely to a motive to kill, but to the kind of motive that 'would in turn support an inference that the killing was the result of a "pre-existing reflection" and "careful thought and weighing of considerations" *rather than* "mere unconsidered or rash impulse hastily executed." ' [Citation.]" (*People v. Boatman, supra,* 221 Cal.App.4th at p. 1268, italics added in original.) Here, there is little indication that defendant had decided to shoot the victim until the time he actually pulled the trigger. The ATM video showed that Gould was in a vulnerable position when defendant and Estrada initially approached.[12] Defendant could

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[11] The dissent contends there was "extremely strong evidence of planning" including the fact that defendant and Estrada identified Gould as the robbery victim and approached him when it was possible to also steal his vehicle. But this is merely evidence defendant planned the *robbery* and the *carjacking*. The dissent does not explain how this evidence showed defendant had planned to *murder* Gould "as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily …. [Citation.]" (*People v. Rowland, supra,* 134 Cal.App.3d at p. 7.)

[12] The dissent describes in detail several frames shown in the ATM surveillance video. But in its subsequent analysis, the dissent only relies on a single observation from the video that is not otherwise established by testimony. In at least one frame, the surveillance video shows defendant "with his left hand at or near the waistband of his long baggy shorts." The dissent submits that the "initial positioning of defendant's hand suggests he was ready and able to deploy his gun when needed." But the video does not show where defendant was carrying the gun before brandishing it. Specifically, the video does not show that the gun was in the front left portion of defendant's waistband near where his left hand was situated. If defendant was carrying the gun on his right or back side – or somewhere other than his waistband – then the position of his left hand on the left side of his body does not support the inference urged by the dissent. Moreover, the

have easily walked up behind Gould, shot him immediately, and have taken the money. Instead, defendant and/or Estrada told the victim to give them his money, and only after the victim replied, "[F]**k you" and scuffled with Estrada did the shooting occur. Of course defendant's conduct is reprehensible and should be strongly punished, but it does not point to a willful, deliberate, premeditated intent to kill.

People v. Mendoza

In concluding otherwise, the dissent relies heavily on a case the Attorney General does not cite: *People v. Mendoza* (2011) 52 Cal.4th 1056 (*Mendoza*). In *Mendoza*, the defendant was on parole, and one of his parole conditions was that he not possess any deadly weapons. One night, defendant – who had a gun on his person – was walking with his girlfriend, Johanna Flores, and a man nicknamed "Sparky" when a bright light turned on behind them. (*Id.* at pp. 1063–1064.) The defendant looked over his shoulder and said, "Oh shit, the *jura*." (*Ibid*.) " '*Jura*' means 'cops.' " (*Ibid*.) A police car stopped behind them and Officer Fraembs exited the vehicle. (*Ibid*.) The defendant said, " 'Oh, shit. I got the gun.' " (*Ibid*.) Fraembs asked, " 'How are you guys doing tonight?' " (*Id.* at p. 1065.) The defendant responded "with an attitude," saying something like, " 'What the hell are you stopping us for' " or " 'What are you stopping us for.' " (*Ibid*.) Fraembs initiated a weapons search of Sparky. (*Ibid*.)

When the officer began to pat down Sparky, "defendant acted as if he were complying with Officer Fraembs's direction to sit down on the curb," but he was actually "using Flores as a shield and carefully controlling her movements" so he could "approach Fraembs … and to maneuver himself to a position of advantage over the unsuspecting officer. Once the defendant got within six or seven feet of the officer, he was able to draw his gun while still screened by Flores. The defendant then pushed her aside and

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video shows defendant firing the gun with his right hand. The suggestion that defendant may have been readying himself to use the gun earlier in the encounter is speculation.

quickly stepped even closer to Fraembs. He took aim with both arms extended and shot the officer in the face." (*Mendoza*, *supra*, 52 Cal.4th at p. 1070.)

In determining whether the manner of killing indicated premeditation, the Supreme Court concluded, "None of the evidence suggested that defendant fired his weapon in a rash or panicked reaction to Officer Fraembs's appearance on the scene; indeed, all the evidence pointed to the contrary." (*Mendoza*, *supra*, 52 Cal.4th at p. 1071.) "When Fraembs indicated he would conduct a weapons search, defendant reacted in a cool and focused manner: he contrived to act as if he were following Fraembs's instruction to take a seat on the curb, but in actuality he formed a plan to approach and shoot Fraembs while the officer was distracted with Sparky. *Because the manner of killing reflected stealth and precision*, a rational jury could conclude that a preconceived design was behind the killing. [Citations.]" (*Ibid.*, italics added.)

In contrast, the evidence in this case indicates defendant *did* "fire[] his weapon in a rash and panicked reaction" (*Mendoza*, *supra*, 52 Cal.4th at p. 1071) to the victim's resistance. Defendant and Estrada approached the victim and demanded his money. Instead of complying, the victim surprisingly responded by saying, "F**k you." The *victim* described defendant as "scared," and defendant later told police he was scared because the victim was approaching him and was bigger than he was. Defendant fired one shot. The entire incident occurred in a matter of seconds. !(Exh 2 5:52-6:00)!

In sum, the evidence indicated that if defendant had a premeditated intent to murder Gould he could have easily done so. Instead, in a matter of seconds, defendant and Estrada tried to steal Gould's cash, Gould surprisingly resisted, and defendant, appearing scared, fired once.

People v. Koontz

The dissent also cites *People v. Koontz* (2002) 27 Cal.4th 1041 (*Koontz*). In that case, the Supreme Court helpfully summarized the facts showing premeditation and deliberation:

> "Defendant, having armed himself in the early morning hours with two concealed and loaded handguns, argued with the victim in the apartment they shared. *When the victim sought refuge* … in a different apartment in the complex, *defendant pursued him* and persisted in the argument as the victim walked back and forth in the hallway. After [someone] unsuccessfully exhorted the two men to resolve their differences, and indicated by gesture that he intended to write up a disciplinary report based on their failure to do so, *defendant said, 'All right, I'll settle it.' Defendant then entered the office, locked the door and pulled a handgun from the waistband of his pants.* After the victim refused defendant's demand for his car keys, defendant fired a shot at the victim's abdomen. *He then took active steps to prevent [someone] from summoning medical care, without which the victim was certain to die*." (*Id.* at pp. 1081–1082, italics added.)

The dissent concludes that the facts in the present case support premeditation "[s]imilar to *Mendoza* and *Koontz*." (Conc. & dis. opn. at p. 5.) But *Koontz* involved several crucial facts that simply have no analogue here. Prior to the shooting, the *Koontz* defendant said, " 'All right, I'll settle it,' " before entering an office, locking the door, pulling a handgun, shooting the victim, and preventing someone nearby from summoning medical care. These facts support an inference that the defendant fired after reflecting on his decision to kill the victim. The same cannot be said of the present case. *Koontz* is not applicable.

Nature of the Killing

The third *Anderson* category concerns the nature of the (attempted) killing " ' "from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way …." ' " (*People v. Casares*, *supra*, 62 Cal.4th at p. 824.) For example, when a defendant shoots the victim "execution-style" without a struggle (*People v. Romero* (2008) 44 Cal.4th 386, 401), or in the back of the head at very close range, it indicates the defendant intended to kill according to " 'a preconceived design.' " (*People v. Casares*, *supra*, at p. 825.)

As noted above, the victim was in a vulnerable position – unaware, with his hands occupied with a cell phone and an ATM receipt – when defendant and Estrada "ran up."

Yet, rather than immediately shooting the victim and taking his money, the men exchanged words. Only after the victim replied, "F**k you," and scuffled with Estrada, did defendant fire a single shot at the victim.[13]

The dissent responds by correctly observing that "our Supreme Court has recognized that firing a shot at a vital area of the body at close range is evidence of a deliberate intent to kill." (Conc. & dis. opn. at p. 6.) But "deliberate and premeditated first degree murder requires more than a showing of intent to kill." (*People v. Casares*, *supra*, 62 Cal.4th at p. 824.) " '[T]he legislative classification of murder into two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill ...." (*People v. Lunafelix*, *supra*, 168 Cal.App.3d at p. 100.)

The dissent goes on to say that premeditation can be reasonably inferred from a close-range shooting that occurred without any provocation or evidence of a struggle. (Conc. & dis. opn. at p. 6.) But here, there was evidence of "provocation."[14] Gould said,

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[13] The precise entry point is not disclosed in the record, but there was testimony the bullet hit the lower portion of the victim's left lung. While the location of the wound may be consistent with an intent to kill, the firing of a single shot at that area of the body is not " 'so particular and exacting' as to show that defendant must have 'intentionally killed according to a "preconceived design"....' [Citation.]" (*People v. Rowland*, *supra*, 134 Cal.App.3d at p. 9.)

[14] "Provocation" is perhaps an imprecise or overly restrictive term in this context. The connotation of the word in common usage might suggest wrongdoing by the victim. But that need not be the case. Here, Gould was justified in resisting defendant's unlawful and reprehensible conduct. And defendant was entirely unjustified in shooting Gould. But when premeditation jurisprudence speaks of "provocation," it is always referring to provocation insufficient to justify the defendant's actions, either in part or in full. Otherwise, the killing would be manslaughter or perhaps even a justifiable homicide.

The overarching question is whether the killing was the result of " 'a "pre-existing reflection" and "careful thought and weighing of considerations" *rather than* "mere unconsidered or rash impulse hastily executed." ' [Citation.]" (*People v. Boatman*, *supra*, 221 Cal.App.4th at p. 1268, italics added in original.) Thus, any event that leads a defendant to actually kill from a "rash impulse hastily executed" rather than "careful

"F**k you" and scuffled with defendant's friend. In this respect, even several facts highlighted by the dissent do not support premeditation. The dissent emphasizes that "defendant hung back and watched as Estrada confronted Gould" "[i]nstead of immediately engaging the victim," and that "defendant produced his weapon and fired" "[w]hen Gould offered resistance …." (Conc. & dis. opn. at p. 5.) But these facts do not support premeditation, they undermine it. That defendant only "produced his weapon and fired" after "Gould offered resistance" is consistent with a shooting hastily executed in response to rapidly unfolding events, not one resulting from preexisting reflection.

And while it is true that firing a gun at vital areas of a person's body – such as the head – can support an inference of intent to kill; there is a difference between how the manner of a killing bears on the issue of premeditation versus intent to kill. The location of a shot is relevant on the issue of intent to kill because shooting someone in a vital area will likely result in death, which raises an inference that the defendant fired with the purpose of causing death (i.e., intent to kill). But when it comes to premeditation, the manner of killing is relevant insofar as it indicates the defendant was acting "according to a '*preconceived design*' to take his victim's life *in a particular way* …." (*Anderson*, *supra*, 70 Cal.2d at p. 27, italics added.) Thus, the severity of the victim's wounds do not establish premeditation. (See *People v. Pantoja* (2004) 122 Cal.App.4th 1, 14 and cases cited therein.) That is why even brutal murders, for which intent to kill is clearly established, may involve no premeditation at all. (*People v. Craig* (1957) 49 Cal.2d 313, 318.)

In sum, the fact that a defendant acts in a manner very likely to cause death (e.g., strangulation or shooting a vital area of the body) is not dispositive on the issue of premeditation, which is concerned with whether the defendant was acting according to a *preconceived* design. That a shot was fired at relatively close range (rather than point

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thought and weighing of considerations" is sufficient to negate premeditation even if that event does not constitute "provocation" in the lay sense of that term.

blank or "execution style") is not independently sufficient to establish premeditation. (See *People v. Boatman*, *supra*, 221 Cal.App.4th at pp. 1271–1273.)

Here, a single shot apparently fired at the side of the victim's torso from at least several feet away does not indicate "a '*preconceived design*' to take his victim's life *in a particular way* …." (*Anderson*, *supra*, 70 Cal.2d at p. 27, italics added.)

C. There was Sufficient Evidence to Support the Gang Enhancements

Defendant next contends there was insufficient evidence to support the gang enhancement allegations found true by the jury. We disagree.

Specifically, defendant contends the prosecution's gang expert "relied heavily on the association aspects of the gang statute to find that the instant crime was gang related."[15] We see no problem with such reliance. The gang enhancement "requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, italics in original.) Because this element "is worded in the disjunctive, a gang enhancement may be imposed without evidence of any benefit to the gang so long as the crime was committed in association with or at the direction of" [a gang.[16]] (*People v. Leon* (2008) 161 Cal.App.4th 149, 162 []; *People v. Morales*[, *supra*,] 112 Cal.App.4th [at p.] 1198 [].)" (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484 (*Weddington*).)

Defendant cites *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*), and argues that there was little evidence these crimes were committed in association with the gang. In

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[15] Defendant also argues that the present case is factually distinguishable from *People v. Olguin* (1994) 31 Cal.App.4th 1355. In *Olguin*, several gang members were offended when their gang graffiti had been crossed out. They went to find whomever crossed out their graffiti and, during an ensuing confrontation, shot and killed the victim. The *Olguin* court held there was sufficient evidence of gang-relatedness. We agree that *Olguin* is distinguishable from the present case, but we do not rely on it in reaching our conclusion here.

[16] *Weddington* says "gang member" instead of "gang" here. We prefer to reflect the statutory language, which says "at the direction of, or in association with any criminal street *gang* …." (§ 186.22, subd. (b)(1), italics added.)

Albillar, the Supreme Court held there was sufficient evidence the perpetrators came together *as gang members* to commit a crime. (*Id.* at p. 62.) The court observed that not only had the gang members "actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together." (*Ibid*.) Here, the prosecution's gang expert similarly testified that when two gang members commit crimes together, they offer a benefit to each other in that they are "considered a team." Moreover, when two gang members commit crimes together they are displaying that the gang has more members to assist with crimes. We, like the majority in *Albillar*, find sufficient evidence supporting the finding that defendant and Estrada came together as gang members to commit these crimes.

Defendant argues otherwise, citing favorable testimony from his own expert. But a "jury is not required to accept an expert's opinion." (*People v. Sanchez* (2016) 63 Cal.4th 665, 675.) And, defendant's jury apparently rejected his expert's opinion. The existence of evidence contrary to the jury's finding – such as the defense expert's testimony in this case – is not dispositive. The fact that such evidence could "reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]" (*People v. Hubbard*, *supra*, 63 Cal.4th at p. 392.)

D. <u>There was Sufficient Evidence Varrio Hawaiian Garden has a Pattern of Criminal Activity</u>

Defendant contends there was insufficient evidence concerning primary activities of the Varrio Hawaiian Garden gang.

A criminal street gang is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated] criminal acts…, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

Here, the prosecution's gang expert had investigated 200 to 300 cases in which Varrio Hawaiian Garden gang members were suspects; had personally spoken with Varrio Hawaiian Garden gang members in both friendly and custodial contexts; had been involved in the Hawaiian Garden area for 13 years; had read reports written by other officers concerning crimes committed by Hawaiian Garden gang members; and regularly speaks with other officers about the Hawaiian Garden gang. He opined that the repeated and consistent activities of the gang included: minor assaults with hands and feet, assaults with weapons, attempted murder, murder, extortion, witness intimidation, vehicle theft, robbery, burglary, attempted robbery, and attempted burglary. Several of these are "enumerated" crimes under section 186.22. (See § 186.22, subd. (e)(1)–(3), (8), (11), (19), (25).) This testimony of the prosecution's gang expert was sufficient evidence that one of the primary activities of the Varrio Hawaiian Garden gang is the commission of certain enumerated felonies.

As the Supreme Court has explained:

> "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Defendant argues that the prosecution gang expert's assertion that the primary activities of Hawaiian Garden was the commission of these enumerated crimes was not supported by sufficient underlying facts to enable the jury to assess the reliability of his opinion. But the expert's testimony that Hawaiian Garden gang members repeatedly

committed the identified crimes is not opinion testimony; it is testimony asserting a fact. Either Hawaiian Garden gang members have repeatedly committed those crimes or they have not. To the extent the defense felt there was insufficient foundation for the testimony, it was obligated to object on that basis. The failure to do so forfeits the objection. (See *People v. Price* (1991) 1 Cal.4th 324, 430; *People v. Armstrong* (1991) 232 Cal.App.3d 228, 233, fn. 6.)

In sum, the gang expert testified he had significant personal knowledge of the Hawaiian Garden gang and its members, and he testified that those gang members repeatedly committed certain crimes. The jury was free to accept or reject that assertion of fact, and it apparently chose to accept it. We see no reason to disturb that determination.

II. Sua Sponte Instruction Clarifying "In Association with any Criminal Street Gang"

The trial court instructed the jury that in order to prove the gang enhancement allegation, "the People must prove that: 1. the defendant committed or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang; and 2. the defendant intended to assist, further, or promote criminal conduct by gang members." (See CALCRIM No. 1401; § 186.22, subd. (b)(1).) Defendant claims the court erred in failing to give a sua sponte instruction clarifying the meaning of the phrase "in association with any criminal street gang."[17]

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[17] Defendant insists the failure to object below does not forfeit this issue. We are less certain. Section 1259 does provide that this court may review "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) However, notwithstanding section 1259, "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general *or incomplete* unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Mackey* (2015) 233 Cal.App.4th 32, 106, italics in original, internal quotation marks omitted.) When a defendant does not argue that the instruction was inherently erroneous, but instead should have been supplemented, the issue is forfeited when not raised below. (*Ibid*.) Nonetheless, we will consider the merits of defendant's claim here.

We have previously held that trial courts have " 'a sua sponte duty to give amplifying or clarifying instructions " 'where the terms used [in an instruction] have a technical meaning peculiar to the law.' " [Citations.] Conversely, "[a] trial court has no sua sponte duty to give amplifying or clarifying instructions … where the terms used in the instructions given are 'commonly understood by those familiar with the English language.' [Citation.]" [Citation.]' [Citation.]" (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1338.) Thus, the question is whether the word or phrase as used in "common parlance differs from the legal definition …." (*Ibid*.)

Defendant claims that in *Albillar* the Supreme Court "provided a definition" for the statutory phrase "in association with." Defendant further asserts that the *Albillar* majority held that " 'in association with any criminal street gang' *requires* a showing that the defendant 'relied on … common gang membership and the apparatus of the gang in committing' the charged crimes." (Italics added.)

Defendant misreads *Albillar*. *Albillar* did hold that the crimes in that case were committed "in association with" the gang because the perpetrators relied on their common gang membership and the apparatus of the gang in committing the crimes. The court did not hold, however, that such evidence is *always* required to show a crime was committed "in association with" a gang. Reliance on the gang apparatus and common gang membership is just how association was shown in that particular case. *Albillar* simply did not "provide a definition for" the phrase "in association with," as defendant claims.

Because we are not persuaded that the phrase "in association with any criminal street gang" has a legal definition that differs from common parlance, we conclude the court did not err in failing to define or explain the phrase sua sponte.

III. Section 654 Claims

Defendant contends the trial court should have stayed the prison terms imposed on the robbery and carjacking convictions under section 654.

A. Section 654 and Related Case Law

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

Plainly stated, section 654 " 'prohibits multiple punishment for the same "act or omission…." ' " (*People v. Correa* (2012) 54 Cal.4th 331, 337.) For example, if a convicted felon commits the single act of possessing a concealed weapon, he cannot be punished for both possession of a firearm by a felon and possession of a concealed weapon. (See generally *People v. Jones* (2012) 54 Cal.4th 350.)

" 'Although [section 654] "literally applies only where … punishment arises out of multiple statutory violations produced by the 'same act or omission,' " [the Supreme Court has] extended its protection "to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]" [Citation.]' [Citation.]" (*People v. Ramirez* (2006) 39 Cal.4th 398, 478.) " ' " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " ' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 459.)

B. Robbery and Attempted Murder

Defendant first argues the court erred in failing to stay the sentence for robbery because it was committed incident to the same objective as the attempted murder. We agree the evidence indicates defendant shot Gould to further the same objective as the robbery: to steal Gould's cash. As the Supreme Court observed in a different context, "when one kills another and takes substantial property from the victim, it is ordinarily

reasonable to presume the killing was for purposes of robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688.)

The Attorney General responds by observing:

> "When the victim showed signs of potentially staunch resistance, appellant shot him, rendering the victim incapable of stopping them from completing the robbery, interfering with their escape, stopping them from taking his car, or contacting authorities or obtaining aid. It was therefore reasonable to conclude appellant harbored multiple criminal objectives."

But shooting Gould was a single act. And "a single criminal act may result in only one punishment, even if the defendant harbored multiple objectives." (*People v. Louie* (2012) 203 Cal.App.4th 388, 399.)

C. Robbery and Carjacking

Defendant next contends that the court erred in failing to stay the carjacking sentence because it was committed incident to the same objective as the robbery. We disagree. It would have been reasonable for the sentencing court to conclude that the objective of the robbery was to obtain the victim's cash and the objective of the carjacking was to escape the scene of the robbery. Because those are separate objectives (cf. *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1006), separate punishment was permitted.

IV. Sentencing

The lower court sentenced defendant to an aggravated term of six years on the robbery conviction. The court described its reasoning concerning aggravation as follows:

> "The reason that the facts in aggravation here outweigh any facts in mitigation – indeed, I cannot think of any facts in mitigation here. There was a very serious robbery at an ATM where the victim wound up getting shot, and very easily he could have wound up dead. Fortunately, he did not. He was seriously injured. And so the conduct itself was very violent and it does indicate a very serious danger to society."

Defendant claims the court improperly aggravated his sentence based on the severity of the injury when great bodily injury was an element of the great bodily injury enhancement.

A sentencing court generally cannot "use a fact constituting an element of the offense … to aggravate … a sentence. [Citations.]" (*People v. Scott* (1994) 9 Cal.4th 331, 350, fn. omitted.) But as the Attorney General points out, any single aggravating factor "is sufficient to impose an aggravated sentence where the aggravating factor outweighs the cumulative effect of all mitigating factors, justifying the upper prison term when viewed in light of the general sentencing objectives …." (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) And here, the severity of the injury was not the only aggravating factor identified by the court. The court also found that "the conduct itself … does indicate a very serious danger to society." This is an appropriate sentencing factor. (Cal. Rules of Court, rule 4.421(b)(1) ("rule 4.421(b)(1)").) Defendant responds that this factor "relies on facts pertaining to the robbery conviction, and as such is prohibited by … dual use principles…." We reject this contention. While every robbery necessarily involves the use of force or fear (§ 211), not every robbery is so violent that it "indicates a serious danger to society" (rule 4.421(b)(1)). (See, e.g., *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1244–1246, disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3.) Indeed, with respect to robbery, the degree of force used is immaterial. (*People v. Jones* (1992) 2 Cal.App.4th 867, 871.) Put another way, the use of violence "that indicates a serious danger to society" (rule 4.421(b)(1)) is not an element of robbery. Here, the sentencing court found that the circumstances surrounding this particular robbery involved sufficient violence to indicate a serious danger to society, warranting an aggravated term. We see no basis for overturning that conclusion.

Defendant also claims the court erred because it "did not refer to any mitigating factors." However, when a defendant fails to objet below, he or she forfeits any appellate

contention that the court failed to properly make or articulate its discretionary sentencing choices. (*People v. Scott*, *supra*, 9 Cal.4th at p. 353.) Consequently, we find defendant's contention has been forfeited.

DISPOSITION

The finding that defendant committed attempted murder willfully, deliberately and with premeditation, within the meaning of section 664, subdivision (a) is reversed and that special allegation may not be retried. The attempted murder conviction itself remains in place. The matter is remanded for resentencing with directions to stay execution of the sentence on the robbery conviction pursuant to section 654. In all other respects, the judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

I CONCUR:

_____
PEÑA, J.

McCABE, J., Concurring and Dissenting.

I dissent from the majority opinion in part I.B. regarding sufficiency of the evidence for premeditation. (Maj. opn., *ante*, at pp. 16–24.) I concur in all other aspects of the opinion.

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the Supreme Court provided guidelines to analyze the sufficiency of the evidence to sustain findings of premeditation and deliberation. Those factors are: (1) planning activity, (2) motive, and (3) manner of killing. (*Id.* at pp. 26–27.) A verdict of first degree murder is typically sustained when: (1) there is evidence of all three factors; or (2) there is "extremely strong evidence" of planning activity; or (3) there is evidence of motive to kill in conjunction with planning activity; or (4) there is evidence of motive to kill in conjunction with the manner of killing. (*Id.* at p. 27.)

The majority opinion addresses the *Anderson* factors. (Maj. opn., *ante*, at pp. 18–22.) Contrary to the majority's conclusion, however, the *Anderson* factors dictate affirming the jury's finding.

Planning Activity

I agree with the majority opinion that this record indicates "planning activity." As the majority notes, "defendant brought a loaded gun to an ATM with intent to rob one of its patrons." (Maj. opn., *ante*, at p. 19.) However, the majority opinion suggests the evidence of planning activity was not extremely strong. I disagree and note the majority failed to address relevant facts.

Defendant and Estrada were sitting in the back seat of the Trailblazer when Gould was observed using the ATM machine. Quintero was driving the Trailblazer. Gould's vehicle, which had an open door, was parked next to the ATM as Gould withdrew money. After the robbery, defendant and Estrada left the crime scene in Gould's vehicle, which they drove a couple blocks north to a stop sign. The Trailblazer was parked at that

location. Defendant and Estrada ran to the Trailblazer, got in, and went home. The officer who responded to the shooting dispatched a description of Gould's vehicle. It was discovered by another officer at its abandoned location with its motor still running.

Not only did defendant and Estrada plan a robbery at the ATM, they identified Gould as the victim and approached him when it was possible to also steal his vehicle. The evidence strongly suggests defendant and his accomplices agreed upon a rendezvous site before committing this crime. Because of this planning, Gould's vehicle was quickly abandoned and the suspects had driven away in the Trailblazer. Law enforcement was delayed in finding the suspects. This is extremely strong evidence of planning.

Defendant's Conduct with Respect to the Victim

In concluding defendant's actions do not show premeditation or deliberation, the majority opinion notes defendant could have immediately shot Gould at the ATM. The majority also states the ATM video shows "little indication" defendant decided to shoot Gould "until the time he actually pulled the trigger." (Maj. opn., *ante*, at pp. 19–20.) This analysis, however, fails to address defendant's actual conduct.

As evidenced in the ATM video, at approximately 5:14:48, defendant and Estrada are first seen approaching Gould as he stands in front of the ATM. Approximately one second later, Estrada walks up to Gould, who turns and faces him. Defendant is seen hanging back with his left hand at or near the waistband of his long baggy shorts. At approximately 5:14:52, Estrada is seen scuffling with Gould, and defendant has moved closer. Based on Estrada's position, it is impossible to see defendant's hands. At 5:14:53, defendant has his right arm raised in a firing position. Gould is not visible in the video. Estrada is approximately parallel to defendant and looking in the general direction where it appears defendant is aiming his handgun. Defendant then moves to his left onto the parking lot while continuing to hold his right arm in a firing position. Gould is not visible. At 5:14:55, defendant is standing in the parking lot with his right hand up but not

fully extended. At 5:14:56, cash is seen lying on the parking lot. Both defendant and Estrada bend over the cash, that they pick up before fleeing. Defendant is the first to run towards Gould's vehicle. Estrada flees at approximately 5:15:02.

An extended period of time is not required for premeditation and deliberation. (*People v. Lee* (2011) 51 Cal.4th 620, 636.) The real issue is the extent of reflection. (*Ibid.*) Based on defendant's actions, a reasonable jury could have found, not only an intent to kill, but a cold and deliberate decision to do so. Defendant initially hung back while Estrada interacted with Gould. The initial positioning of defendant's hand suggests he was ready and able to deploy his gun when needed. Defendant drew his weapon and fired it only after it became clear Gould was not cooperating. Defendant's actions do not show rash impulse, but, rather, a calculated decision on when to employ his gun.

Two Supreme Court cases, *People v. Mendoza* (2011) 52 Cal.4th 1056 (*Mendoza*) and *People v. Koontz* (2002) 27 Cal.4th 1041 (*Koontz*), are instructive.

In *Mendoza*, the defendant, a gang member, was a parolee from the California Youth Authority. Under the terms of parole, he was not to possess deadly weapons or knowingly associate with gang members. (*Mendoza*, *supra*, 52 Cal.4th at p. 1063.) On the night in question, the defendant, accompanied by his girlfriend, Flores, walked from a gang house in Pomona to meet another gang member, Cesena. The defendant was carrying a loaded .45-caliber handgun. Cesena had a knife. (*Id.* at p. 1064.) Later, while walking back to the gang house, a bright light turned on behind them. The defendant looked over and said, "Oh, shit, the *jura*." "'*Jura*' means "'cops.'" (*Ibid.*, original italics.) A police car stopped behind them and an officer exited the vehicle. The defendant muttered, "Oh, shit. I got the gun." (*Ibid.*) Both Flores and Cesena encouraged the defendant to run, but he stayed. The officer asked how everyone was doing, and the defendant sarcastically asked why they had been stopped. The officer called Cesena over to his patrol vehicle and began patting him down. As that occurred,

the defendant used Flores as a shield and walked towards the officer. The defendant shot the officer once in the face from a distance of about two and a half feet, killing him. The officer was found with his gun secure in its snapped-shut holster and his baton still attached to his belt. The defendant's pager and a .45-caliber shell casing were found near the body. (*Id.* at pp. 1063, 1065–1066.)

On appeal, the Supreme Court reviewed, in part, the sufficiency of the evidence to sustain the defendant's conviction of premeditated and deliberate first degree murder. *Mendoza* noted it was not the passage of time but "reflection" that established premeditation and deliberation. (*Mendoza, supra,* 52 Cal.4th at p. 1069.) The Supreme Court reviewed and applied the factors from *Anderson, supra,* 70 Cal.2d at pp. 26–27. The defendant argued there was no prior plan to kill, emphasizing it was the officer who initiated the encounter. (*Mendoza, supra,* 52 Cal.4th at p. 1069.) *Mendoza* rejected that contention, finding sufficient evidence the defendant devised a plan after the encounter began to surprise the officer and shoot him. (*Id*. at p. 1070.) There was sufficient evidence the defendant killed to avoid arrest and a return to custody. Finally, as the defendant conceded, the single shot to the officer's head supported an inference of a deliberate intent to kill. (*Id.* at pp. 1070–1071.) *Mendoza* concluded "the evidence of planning, motive, and manner of killing was compelling and amply supported a finding of premeditation and deliberation." (*Id.* at p. 1072.)

In *Koontz, supra,* 27 Cal.4th 1041, the defendant, having armed himself in the early morning hours with two concealed and loaded handguns, argued with the victim in the apartment they shared. The victim walked away and the defendant pursued him to the complex's offices. After a staff member asked the men to resolve their differences, the defendant said, "All right, I'll settle it." The defendant entered the office, locked the door and pulled a handgun from the waistband of his pants. The defendant demanded the victim's car keys, which was refused, and the defendant shot the victim in his abdomen.

He then took active steps to prevent the staff member from summoning medical care. The victim later died. (*Koontz, supra,* 27 Cal.4th at pp. 1055–1057.)

On appeal the defendant contended, in part, that insufficient evidence supported his conviction of first degree murder based on premeditation. The defendant argued the shooting was a rash and impulsive act, the culmination of an argument, and the factors in *Anderson, supra,* 70 Cal.2d 15, supported reversal. (*Koontz, supra,* 27 Cal.4th at pp. 1080–1081.) *Koontz* cautioned it was inappropriate to rely on the *Anderson* factors without reflection. These factors were a "framework" to assist a reviewing court, but they "'are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.' [Citation.]" (*Koontz, supra,* 27 Cal.4th at p. 1081.)

Applying the *Anderson* factors, the *Koontz* court "easily" found "evidence of planning (defendant's arming himself and following the victim to the … office), motive (to effectuate a robbery), and a manner of killing indicative of a deliberate intent to kill (firing a shot at a vital area of the body at close range, then preventing the witness from calling an ambulance). These facts suffice to support a verdict of premeditated and deliberate first degree murder." (*Koontz, supra,* 27 Cal.4th at p. 1082.)

Here, defendant and Estrada chose Gould as their target and approached with hidden weapons. Instead of immediately engaging the victim, defendant hung back and watched as Estrada confronted Gould. When Gould offered resistance, defendant produced his weapon and fired. Time was of the essence as other people, including law enforcement or a security guard, could have appeared at any moment. Defendant shot at a vital area of Gould's body at close range. The shooting was done to effectuate the robbery. Similar to *Mendoza* and *Koontz*, these facts support the jury's finding of premeditation and deliberation.

Nature of the Killing

The majority dismisses the manner of the attempted killing, noting only a single shot was fired and the bullet hit the lower portion of Gould's left lung. (Maj. opn., *ante*, at p. 21.) However, our Supreme Court has recognized that firing a shot at a vital area of the body at close range is evidence of a deliberate intent to kill. (*Koontz, supra,* 27 Cal.4th at p. 1082.) Premeditation and deliberation may be reasonably inferred from a close-range shooting that occurred without any provocation or evidence of a struggle. (See *People v. Thompson* (2010) 49 Cal.4th 79, 114–115; accord *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295; *People v. Marks* (2003) 31 Cal.4th 197, 230.)

Here, defendant did not struggle with Gould, and Gould did not provoke him. To the contrary, it was Estrada who provoked Gould when demanding money, and it was Estrada who struggled with Gould. Defendant watched, moved closer, and then fired at Gould at close range. This close-range shooting reasonably supports an inference of premeditation and deliberation.

As the majority notes, it is not our role to reweigh the evidence, and we are to affirm the judgment if the circumstances reasonably justify the jury's findings. (Maj. opn., *ante*, at p. 14.) This record demonstrates planning activity, motive, and a manner of killing suggesting premeditation. Reviewing the record in the light most favorable to the jury's determination, as the majority acknowledges we must, the evidence was plainly sufficient to sustain the jury's finding based on the *Anderson* factors.

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McCabe, J. †

† Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.